

No. 34399

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**MICHAEL BLANKENSHIP and  
MISTY BLANKENSHIP,**

**Plaintiffs Below, Appellees,**

**v.**

**THE CITY OF CHARLESTON and  
BOSTON CULINARY GROUP, INC.  
d/b/a DISTICTIVE GOURMET,**

**Defendants/Third-Party Plaintiff Below, Appellees,**

**v.**

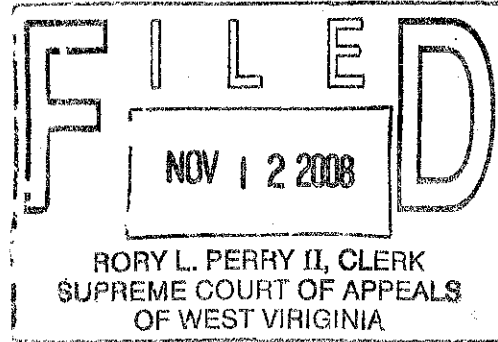
**LAKEWOOD SWIM CLUB, INC.**

**Third-Party Defendant/  
Fourth-Party Plaintiff Below, Appellant,**

**v.**

**EVANSTON INSURANCE COMPANY,**

**Fourth-Party Defendant Below, Appellee.**



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From the Circuit Court of Kanawha County  
The Honorable James C. Stucky  
Civil Action No. 06-C-2062

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**BRIEF OF APPELLANT LAKEWOOD SWIM CLUB**

C. Benjamin Salango (WVSB #7790)  
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## **KIND OF PROCEEDING AND NATURE OF LOWER COURT'S RULING**

Plaintiffs instituted the underlying personal injury action as a result of injuries sustained by Plaintiff Michael Blankenship ("Blankenship") on October 14, 2005. On that date, Blankenship suffered a fractured left leg when he fell at a country music concert held at the Charleston Civic Center. Plaintiffs allege that Blankenship slipped on beer that was spilled at a concession stand operated by Lakewood Swim Club, Inc. ("Lakewood") a non-profit organization which was holding a fundraiser at the concert.

Plaintiffs did not initially name Lakewood as a Defendant. Rather, Lakewood was brought in pursuant to a Third-Party Complaint filed by Boston Culinary Group, Inc. ("Boston Culinary"), which contracted with Lakewood. Plaintiffs subsequently amended the Complaint to bring a direct cause of action against Lakewood, alleging a claim for negligence against Lakewood's members who were working at the concession stand.

Lakewood submitted the claims to its insurer, Evanston Insurance Company ("Evanston"), which refused to provide a defense or indemnity. Lakewood filed a Fourth Party Complaint against Evanston, seeking, among other things, a declaration of Evanston's duty to defend Lakewood and provide coverage for the claims made against it in this action. After discovery was conducted on these issues, Lakewood filed a Motion for Partial Summary Judgment; and, Evanston filed a Combined Response and Cross-Motion for Summary Judgment. A hearing was held on December 6, 2007, before The Honorable James C. Stucky, Judge of the Circuit Court of Kanawha County. On December 11, 2007, Judge Stucky granted summary judgment in favor of Evanston, leaving Lakewood without a defense and without coverage for lawsuits filed against it in the underlying action.

## STATEMENT OF FACTS

### **1. Lakewood Swim Club**

Lakewood Swim Club is a non-profit organization operated and managed by a number of volunteers in the Kanawha County, West Virginia area. Lakewood Swim Club has operated in Kanawha County for more than 40 years and currently has over 150 members. Lakewood is funded entirely through monthly membership dues, concession stand sales and fund raising events, such as the one at issue in the present appeal. *See* Affidavit of Jeff H. Goode and Affidavit of Tim Quinlan, Jr., attached respectively hereto as Exhibits A and B.

### **2. The Policy**

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In May 2005, Lakewood Swim Club purchased a commercial general liability policy from Evanston Insurance Company bearing Policy No. CP470100909 with effective dates of May 10, 2005 to May 10, 2006 (hereinafter the "Policy").<sup>1</sup> With respect to coverage, the Policy provides as follows:

#### **COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY**

##### **1. Insuring Agreement**

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' . . . to which this insurance applies. We will have the right and duty to defend the insured against any 'suit' seeking those damages. . .

\* \* \* \* \*

- b. This insurance applies to 'bodily injury' . . . only if:

- (1) The 'bodily injury' . . . is caused by an 'occurrence' that takes place in the 'coverage territory'; and
- (2) The 'bodily injury' . . . occurs during the policy period.

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<sup>1</sup> Lakewood paid Evanston a premium of \$5,450.90 for one year. *See* excerpts of Policy at 0003, attached as Exhibit C.

See excerpts of Policy at 0011, attached as Exhibit C.<sup>2</sup> The Policy defines “coverage territory”, in pertinent part, as follows:

“Coverage territory” means:

- a. The United States of America (including its territories and possession), Puerto Rico and Canada;
- b. International waters or airspace, provided the injury or damage does not occur in the course of travel or transportation to or from any place not include in **a.** above; or
- c. All parts of the world . . .

See Exhibit C at 0019.

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Significantly, the Policy also contains an “ADDITIONAL INSURED – CLUB MEMBERS ENDORSEMENT” which reads:

WHO IS AN INSURED (Section II) of the Commercial General Liability coverage part is amended to include as an insured any of your members, but only with respect to their liability for your activities or activities they perform on your behalf.

See Exhibit C at 0027. And, the Policy contains Endorsement ME-217 (11/99) which states:

**SPECIFIED/DESIGNATED PREMISES/PROJECT LIMITATION**

\* \* \* \* \*

This insurance applies only to ‘bodily injury’, ‘property damage’, ‘personal injury’, ‘advertising injury’ and medical expenses arising out of:

1. The ownership, maintenance or use of the premises shown in the Schedule (or Declarations), or
2. The *project* shown in the Schedule (or Declarations). (Emphasis added).

See Exhibit C at 0041. The Policy does not specifically define the term *project* but references “Private Swim Club” in the Common Policy Declarations and in the Endorsement M/E-217

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<sup>2</sup> A bates numbered copy of the entire Policy is attached as an exhibit to Lakewood’s Memorandum of Law in Support of Motion for Summary Judgment. Due to page limit constraints, an abbreviated version of the Policy is attached hereto as Exhibit C using the original bates numbers.

(11/99) Schedule. *Id.* The Policy contains no provision stating that a “bodily injury” must occur on Lakewood’s premises to trigger coverage. Instead, the Policy specifically and unequivocally covers claims that occur off of Lakewood’s premises. *See* Exhibit C 0011 and 0019.

### 3. The Claim

On October 14, 2005, members of the Lakewood Swim Club operated a concession stand at the Charleston Civic Center during a Rascal Flatts country music concert as a fund raising project. *See* Exhibit B at ¶ 5. During the course of the concert, Plaintiff Blankenship fell at the concession stand and fractured his left leg. Plaintiffs brought suit against the City of Charleston and Boston Culinary for negligence. Boston Culinary impleaded Lakewood into the case for contribution and/or indemnity. Plaintiffs subsequently amended the Complaint and brought a direct action against Lakewood for the alleged negligence of its members.

Lakewood submitted the claims to its insurer, Evanston, which twice denied Lakewood’s claim. Lakewood then filed a Fourth Party Complaint against Evanston and, among other things, served requests for admissions on Plaintiffs, Boston Culinary and Evanston. Responses to these Requests for Admission establish the following undisputed facts:

a. Plaintiffs asserted a claim for negligence arising out of Lakewood’s operation of a concession stand on October 14, 2005. *See* Plaintiffs’ Responses to Lakewood’s Requests for Admission attached as Exhibit E.

b. Plaintiffs’ claim for negligence against Lakewood is based upon the alleged negligence of Lakewood’s **members** who were operating the concession stand on October 14, 2005 on behalf of Lakewood. *Id.*

c. Plaintiffs and Boston Culinary admit that the concession stand at issue in this case was operated as a **project** of Lakewood Swim Club. *See* Boston Culinary's Responses to Lakewood's Requests for Admission attached as Exhibit F.

d. Boston Culinary asserts claims for contribution and indemnity against Lakewood but does not assert a claim for damages arising out of breach of contract. *Id.*

e. Boston Culinary's claim for contribution is premised upon the alleged negligence of the **members** of Lakewood who were operating a concession stand on October 14, 2005 on behalf of Lakewood. *Id.*

f. The Policy *does not* require that "bodily injury" occur on Lakewood's premises as a prerequisite to coverage. *See* Evanston's Responses to Lakewood's Requests for Admission attached as Exhibit D.

### **ASSIGNMENTS OF ERROR**

1. THE CIRCUIT COURT ERRED BY GRANTING SUMMARY JUDGMENT IN FAVOR OF EVANSTON AND AGAINST LAKEWOOD, AND HOLDING THAT EVANSTON OWED NO DUTY TO INDEMNIFY LAKEWOOD FOR THE CLAIMS MADE AGAINST IT IN THIS ACTION.

2. THE CIRCUIT COURT ERRED BY GRANTING SUMMARY JUDGMENT IN FAVOR OF EVANSTON AND AGAINST LAKEWOOD, AND HOLDING THAT EVANSTON OWED NO DUTY TO DEFEND LAKEWOOD AGAINST THE CLAIMS MADE AGAINST IT IN THIS ACTION.

### **POINTS AND AUTHORITIES**

#### **CASES**

<i>Aetna Cas. &amp; Sur. Co. v. Pitrolo</i> , 176 W.Va. 190, 342 S.E.2d 156 (1986) .....	12
<i>Bowyer v. Hi-Lad, Inc.</i> , 609 S.E.2d 895 (W. Va. 2004) .....	12, 14

<i>Bruceton Bank v. United States Fid. and Guaranty Ins. Co.</i> , 199 W.Va. 548, 486 S.E.2d 19 (1997) .....	14
<i>Findley v. State Farm Mut. Auto. Ins. Co.</i> , 213 W. Va. 80, 576 S.E.2d 807 (2002) .....	10
<i>Horace Mann Ins. Co. v. Leeber</i> , 180 W.Va. 375, 376 S.E.2d 581 (1988) .....	12, 14
<i>Keefer v. Ferrell</i> , 221 W. Va. 348, 655 S.E.2d 94 (2007) .....	8
<i>National Mut. Ins. Co. v. McMahon &amp; Sons, Inc.</i> , 177 W.Va. 734, 356 S.E.2d 488 (1987) .....	12
<i>Painter v. Peavy</i> , 192 W. Va. 189, 451 S.E.2d 755 (1994) .....	8
<i>Riffe v. Home Finders Associates, Inc.</i> , 205 W.Va. 216, 517 S.E.2d 313 (1999) .....	13
<i>Shamblin v. Nationwide Mutual Insurance Co.</i> , 175 W.Va. 337, 332 S.E.2d 639 (1985) .....	8
<i>Tackett v. American Motorists Ins. Co.</i> , 213 W.Va. 524, 584 S.E.2d 158 (2003) .....	13

#### **STATUTE AND RULE**

W. Va. Code § 33-6-7. ....	11
W. Va. R.Civ.P. 56(e) .....	11

## DISCUSSION OF LAW

### A. STANDARD OF REVIEW

The Circuit Court's entry of summary judgment is reviewed *de novo*. See Syl. Pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994).

### B. THE CIRCUIT COURT ERRED BY GRANTING SUMMARY JUDGMENT IN FAVOR OF EVANSTON AND AGAINST LAKEWOOD, AND HOLDING THAT EVANSTON OWED NO DUTY TO INDEMNIFY LAKEWOOD FOR THE CLAIMS MADE AGAINST IT.

#### 1. The plain language of the Policy covers the claims asserted

It is well-settled that, "[w]here provisions in an insurance policy are plain and unambiguous and where such provisions are not contrary to a statute, regulation, or public policy, the provisions will be applied and not construed." Syl. Pt. 4, *Keefer v. Ferrell*, 221 W. Va. 348, 655 S.E.2d 94 (2007); Syl. Pt. 2, *Shamblin v. Nationwide Mutual Insurance Co.*, 175 W. Va. 337, 332 S.E.2d 639 (1985). "Language in an insurance policy should be given its plain, ordinary meaning." Syl. Pt. 5, *Keefer v. Ferrell*, 221 W. Va. 348, 655 S.E.2d 94 (2007).

The Policy at issue expressly provides that Evanston "will pay those sums that [Lakewood] becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies. [Evanston] will have the right and duty to defend [Lakewood] against any 'suit' seeking those damages." See Exhibit C at 0011. The Policy applies to "bodily injury" if:

- (1) The 'bodily injury' . . . is caused by an 'occurrence' that takes place in the 'coverage territory'; and
- (2) The 'bodily injury' . . . occurs during the policy period.

*Id.* The Policy clearly states that a "bodily injury" need not occur on Lakewood's premises in order to trigger coverage. See Exhibit D. Rather, there is coverage so long as the injury is caused

by an occurrence within the “coverage territory,” which is defined, in part, as “[t]he United States of America.” *See* Exhibit C at 0019.

Here, under the plain and unambiguous language of the Policy, Plaintiff Blankenship’s claimed injury is a “bodily injury” within the “coverage territory.” It is undisputed that his alleged injury occurred within the “coverage territory” – the State of West Virginia – and during the Policy period of May 10, 2005 to May 10, 2006 – on October 14, 2005.

The fact that there is coverage for the claims asserted against Lakewood in this action is further confirmed by Policy’s “Additional Insured-Club Members Endorsement” and “Specified/Designated Premises/Project Limitation” Endorsement. The latter Endorsement provides that the Policy applies to “bodily injury” arising out of: (1) The ownership, maintenance or use of the premises shown in the Schedule or (2) The *project* shown in the Schedule. *See* Exhibit C at 0041. The term “project” is undefined but references “Private Swim Club” in the Schedule. *Id.* The Affidavits of Jeff H. Goode and Tim Quinlan, Jr. establish that the concession operation at the concert was a project of the Lakewood and that this fund-raising activity was in the normal course of business for Lakewood. *See* Exhibits A and B. Additionally, Plaintiff and Boston Culinary admitted in their responses to Requests for Admission that the concession stand was a fund raising project of Lakewood. *See* Exhibits E and F. It was during the course of Lakewood’s fund-raising project that Plaintiff Blankenship sustained his injury; and, Lakewood had an expectation that coverage would be afforded under the Policy for all fund-raising projects on and off the Club’s premises. Evanston presented no evidence to refute these facts before the Circuit Court.

Moreover, the “Additional Insured-Club Members Endorsement” provides coverage for Lakewood members “with respect to their liability for [Lakewood’s] activities or activities they

perform on [Lakewood's] behalf." See Exhibit C at 0027. Plaintiffs and Boston Culinary have admitted in responses to Requests for Admission that their claims against Lakewood are based entirely upon the alleged negligence of Lakewood's members. See Exhibits E and F.

The plain language of the Policy establishes that Lakewood is entitled to coverage for the claims asserted against it. Accordingly, the Circuit Court's December 11, 2007 order should be reversed and judgment should be entered in favor of Lakewood Swim Club.<sup>3</sup>

**2. The Circuit Court incorrectly and improperly relied upon a supplement to the Commercial Insurance Application rather than the Policy to grant summary judgment in favor of Evanston**

In granting Evanston's Motion for Summary Judgment and denying Lakewood's Motion, the Circuit Court relied heavily on the contents of a "Swim and Racquet Club Supplement" to the "Commercial Insurance Application" submitted in connection with and prior to obtaining the Policy. See Order ¶¶ 8-12, attached as Exhibit G; *see also* Supplement attached as Exhibit H. In particular, the Circuit Court noted that the supplement to the application inquired whether Lakewood "sponsored" "outside events" or "engaged in any special events on or off the swim club premises," and that Lakewood answered "No" to these inquiries. *Id.* These terms are neither included in the Policy, nor defined in the supplement to the application; however, the Circuit Court relied on this section of the supplement to the application in finding that Lakewood's fund-raising activity at the Charleston Civic Center in this instance was not covered under the Policy. See Exhibit G ¶ 11.

The Circuit Court's finding is erroneous and improper. The plain language of the Policy, which is the pertinent document herein, reveals that a "bodily injury" for which coverage is

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<sup>3</sup> The Circuit Court's denial of Lakewood Swim Club's Motion for Summary Judgment is properly reviewable on appeal to this Court. See generally *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W. Va. 80, 576 S.E.2d 807, 827 (2002) ("[W]here ... the order denying one party's motion for summary judgment simultaneously grants summary judgment to another party, such an order is final and appealable.").

provided need not occur on Lakewood's premises. As long as the "bodily injury" is caused by an "occurrence" within the "coverage territory" there is coverage. Likewise, the Policy does not require that Lakewood limit its concession or fund-raising operations/projects to its own facility or premises as a prerequisite to coverage. Rather, the Policy specifically and unequivocally covers claims that occur off of Lakewood's premises. *See* Exhibit C at 0011 and 0019; and, *see* Exhibit D.

In fact, Evanston took no steps to exclude outside events from coverage under the Policy. The Policy excludes coverage for dozens of events including war, terrorism (including biological and pathogenic terrorism), nuclear holocaust, radioactive contamination, pollution, and damage to aircraft. And, oddly, the Policy sold to Lakewood even excludes coverage for injuries sustained during sporting events and the use of swimming pools. *See* Exhibit C. The Policy does not, however, exclude coverage for bodily injury sustained off the premises or during outside events. Had Evanston truly wanted to exclude coverage for such events it would have simply done so.

Moreover, Evanston presented no evidence indicating or suggesting that it would not have issued the policy had Lakewood answered the questions on the supplement to the application differently.<sup>4</sup> Indeed, Evanston did not submit a single Affidavit or discovery response in support of its Motion for Summary Judgment or its Response in Opposition. Rather, Evanston's Motion before the Circuit Court was supported by the arguments of Evanston's lawyers concerning the meaning of the terms relating to coverage under the Policy, counsel's

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<sup>4</sup> Likewise, Evanston presented no evidence that Lakewood's responses to the inquiries on the supplement to the application constituted misrepresentations or fraudulent statements so as to, arguably, prevent recovery under the Policy. *See e.g.* W.Va. Code § 33-6-7.

representations concerning Evanston's expectations relating to coverage under the Policy, and the supplement to the insurance application.<sup>5</sup>

The Circuit Court erred in relying upon the application to award summary judgment in favor of Evanston. As a result, the Circuit Court's order of December 11, 2007 should be reversed and judgment should be entered in favor of Lakewood Swim Club.

### **3. Any ambiguity in the Policy must be resolved in favor of Lakewood**

With respect to general aspects of contractual interpretation involving insurance policies, this Court has held:

[i]t is well settled law in West Virginia that ambiguous terms in insurance contracts are to be strictly construed against the insurance company and in favor of the insured." Syllabus Point 4, *National Mut. Ins. Co. v. McMahon & Sons, Inc.*, 177 W.Va. 734, 356 S.E.2d 488 (1987). See also *Horace Mann Ins. Co. v. Leeber*, 180 W.Va. 375, 378, 376 S.E.2d 581, 584 (1988) ("[A]ny ambiguity in the language of an insurance policy is to be construed liberally in favor of the insured, as the policy was prepared exclusively by the insurer." (citation omitted)); *Aetna Cas. & Sur. Co. v. Pitrolo*, 176 W.Va. 190, 194, 342 S.E.2d 156, 160 (1986) (same). The basic principle is that insurance companies may not deceive insurance consumers into believing they have coverage only to have an exclusionary provision entirely nullify it.

*Bowyer v. Hi-Lad, Inc.*, 609 S.E.2d 895 (W. Va. 2004).

To the extent this Court may find that any provision of the Policy or its Endorsements is ambiguous, that ambiguity must be resolved in favor of Lakewood and the Circuit Court's order must be reversed. See *Horace Mann Ins. Co. v. Leeber*, 180 W.Va. 375, 378, 376 S.E.2d 581, 584 (1988) ("[A]ny ambiguity in the language of an insurance policy is to be construed liberally in favor of the insured, as the policy was prepared exclusively by the insurer.")

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<sup>5</sup> It should be noted that Lakewood objected to the proposed Order submitted by Evanston because the findings of fact and conclusions of law were not supported by any affidavits, discovery responses or evidence. Rather, in complete disregard of Rule 56(e) of the West Virginia Rules of Civil Procedure, the Order, including the findings of fact and conclusions of law, is based almost entirely upon the argument of Evanston's lawyers.

Moreover, to the extent this Court may find that the Circuit Court's reliance on the supplement to the application was proper, there was no evidence presented at the hearing or in Evanston's memorandum of law regarding the definition of "outside event" as that phrase is used in that document. The phrase is not defined in the Policy and in the application. It is unclear whether operating a concession stand as a fundraiser is an "outside event" particularly if one defines "outside event" as something other than the normal course of business for a non-profit swim club. Does "outside event" mean an event which is beyond the insured's normal operations? Does "outside event" mean a swimming or sporting event off of insured's premises? Does "outside event" mean any activity off of the insured's premises? Does "outside event" mean an event that is on the property but outside of the building? No one knows.<sup>6</sup> To be sure, the phrase "outside event" could mean a number of things and is, at best, ambiguous. To the extent that "outside event" is undefined and ambiguous, the ambiguity must be resolved in favor of Lakewood and the Circuit Court's order must be reversed. *See Horace Mann Ins. Co. v. Leeber*, 180 W.Va. 375, 378, 376 S.E.2d 581, 584 (1988) ("[A]ny ambiguity in the language of an insurance policy is to be construed liberally in favor of the insured, as the policy was prepared exclusively by the insurer.")

**C. THE CIRCUIT COURT ERRED BY GRANTING SUMMARY JUDGMENT IN FAVOR OF EVANSTON AND AGAINST LAKEWOOD, AND HOLDING THAT EVANSTON OWED NO DUTY TO DEFEND LAKEWOOD AGAINST THE CLAIMS MADE AGAINST IT IN THIS ACTION.**

"Any question concerning an insurer's duty to defend under an insurance policy must be construed liberally in favor of an insured where there is any question about an insurer's obligations." Syl. Pt. 5, *Tackett v. American Motorists Ins. Co.*, 213 W.Va. 524, 584 S.E.2d 158

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<sup>6</sup> Ambiguity in an insurance policy has been defined as follows: "Whenever the language of an insurance policy provision is reasonably susceptible of two different meaning or is of such doubtful meaning that reasonable minds might be uncertain or disagree as to its meaning, it is ambiguous." *Riffe v. Home Finders Associates, Inc.*, 205 W.Va. 216, 221, 517 S.E.2d 313, 318 (1999).

(2003); Syl. Pt. 3, *Bowyer v. Hi-Lad, Inc.*, 609 S.E.2d 895 (W. Va. 2004). Evanston has a duty to defend Lakewood in the underlying personal injury claim. Defining an insurer's duty to defend, this Court has held:

An insurance company's duty to defend an insured is broader than the duty to indemnify under a liability insurance policy. An insurance company has a duty to defend an action against its insured if the claim stated in the underlying complaint could, without amendment, impose liability for risks the policy covers. If, however, the causes of action alleged in the plaintiff's complaint are entirely foreign to the risks covered by the insurance policy, then the insurance company is relieved of its duties under the policy. "[I]ncluded in the consideration of whether [an] insurer has a duty to defend is whether the allegations in the complaint ... are reasonably susceptible of an interpretation that the claim may be covered by the terms of the insurance polic[y]." Syllabus Point 3, in part, *Bruceton Bank v. United States Fidelity and Guaranty Insurance Co.*, 199 W.Va. 548, 486 S.E.2d 19 (1997).

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*Bowyer v. Hi-Lad, Inc.*, 609 S.E.2d 895 (W. Va. 2004) (holding that CGL policy provided coverage for allegations alleged in Complaint).

The causes of action asserted against Lakewood by Plaintiff and Third Party Plaintiff are not "entirely foreign to the risks covered by the insurance policy." To the contrary, the claims are exactly what the Policy covers. The injuries complained of occurred at a concession stand operated as a fund-raiser for Lakewood by the Lakewood's members. As Evanston admitted in its responses to requests for admissions, the Policy *does not* require that the injury occur on Lakewood's premises as a prerequisite to coverage. Rather, as long as there is an "occurrence" within the "coverage territory" the Policy provides coverage. Coverage under the Policy could not be any clearer.

Because the duty to defend is so broad, the Circuit Court erred in granting summary judgment in favor of Evanston Insurance Company and the December 11, 2007 order must be reversed and judgment entered in favor of Lakewood Swim Club.

**PRAYER FOR RELIEF**

Lakewood respectfully requests that this Court reverse the December 11, 2007 Order of the Circuit Court of Kanawha County granting summary judgment in favor of Evanston, with instructions to the Circuit Court of Kanawha County to enter judgment in favor of Lakewood Swim Club on the declaratory judgment action, and for such other relief as the Court deems appropriate.

**LAKEWOOD SWIM CLUB**

By counsel



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C. Benjamin Salango (WVSB #7790)

**PRESTON & SALANGO, P.L.L.C.**

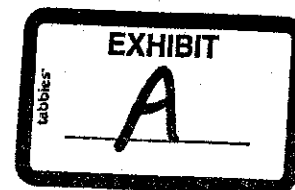
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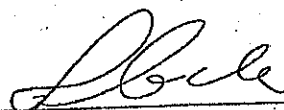
*Counsel for Appellant*




AFFIDAVIT OF JEFF H. GOODE

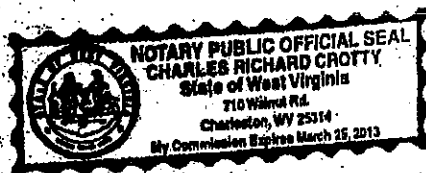
I, Jeff H. Goode, being duly sworn, do hereby swear and affirm as follows:

1. I am over the age of eighteen (18) years and am otherwise competent to offer the following testimony.
2. I am the President of Lakewood Swim Club.
3. Lakewood Swim Club is a non-profit organization comprised of approximately 150 members.
4. Lakewood Swim Club has operated in Kanawha County for more than 40 years.
5. Lakewood Swim Club is funded entirely through monthly membership dues, concession stand sales and fund raising events, such as the one at issue in the present case.
6. A judgment against Lakewood Swim Club in favor of Plaintiffs and/or Third-Party Plaintiff, if enforced, would most likely result in the closure of Lakewood Swim Club.

  
\_\_\_\_\_  
Jeff H. Goode, President of  
Lakewood Swim Club

SWORN TO BEFORE ME this 9<sup>th</sup> day of January, 2008.

  
\_\_\_\_\_  
Notary Public



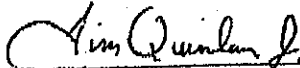
My Commission Expires: 3-25-13



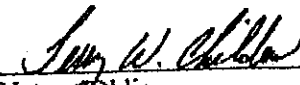
AFFIDAVIT OF TIM QUINLAN, JR.

I, Tim Quinlan, Jr., being duly sworn, do hereby swear and affirm as follows:

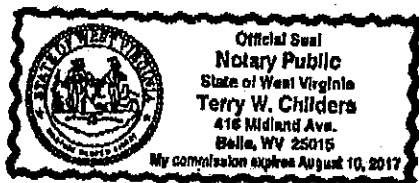
1. I am over the age of eighteen (18) years and am otherwise competent to offer the following testimony.
2. I have been the Treasurer of Lakewood Swim Club for three years. I have also been a member of Lakewood Swim Club for four years.
3. In the three years that I have been Treasurer of Lakewood Swim Club, and for the four years that I have been a member, the Club has operated a concession stand on its premises as a fund raising project.
4. Lakewood Swim Club paid an additional premium to Evanston Insurance Company to operate the concession stand as reflected in the Supplemental Declarations Page for Evanston Policy No. CP470100909.
5. On October 14, 2005, members of Lakewood Swim Club operated a concession stand at the Rascal Flatts concert at the Charleston Civic Center.
6. The concession stand was operated at the concert as a fund raising project of Lakewood Swim Club.

  
\_\_\_\_\_  
Tim Quinlan, Jr., Treasurer of  
Lakewood Swim Club

SWORN TO BEFORE ME this 26<sup>th</sup> day of November, 2007.

  
\_\_\_\_\_  
Notary Public

My Commission Expires: Aug. 10, 2017



EXHIBIT

C

# INSURANCE POLICY



EVANSTON INSURANCE COMPANY

10 Parkway North  
Deerfield IL 60015

In consideration of the payment of the Premium, in reliance upon the statements made to the Company by application and subject to the terms set forth herein, the Company designated on the Declarations page (A Capital Stock Company), herein called the Company, AGREES with the Insured:

## COMMON POLICY CONDITIONS

All Coverage Parts included in this policy are subject to the following conditions.

### A. CANCELLATION

1. The first Named Insured shown in the Declarations may cancel this policy by mailing or delivering to us advance written notice of cancellation.
2. We may cancel this policy by mailing or delivering to the first Named Insured written notice of cancellation at least:
  - a. 10 days before the effective date of cancellation if we cancel for nonpayment of premium; or
  - b. 30 days before the effective date of cancellation if we cancel for any other reason.
3. We will mail or deliver our notice to the first Named Insured's last mailing address known to us.
4. Notice of cancellation will state the effective date of cancellation. The policy period will end on that date.
5. If this policy is cancelled, we will send the first Named Insured any premium refund due. If we cancel, the refund will be pro rata. If the first Named Insured cancels, the refund may be less than pro rata. The cancellation will be effective even if we have not made or offered a refund.
6. If notice is mailed proof of mailing will be sufficient proof of notice.

### B. CHANGES

This policy contains all the agreements between you and us concerning the insurance afforded. The first Named Insured shown in the Declarations is authorized to make changes in the terms of this policy with our consent. This policy's terms can be amended or waived only by endorsement issued by us and made a part of this policy.

### C. EXAMINATION OF YOUR BOOKS AND RECORDS

We may examine and audit your books and records as they relate to this policy at any time during the policy period and up to three years afterward.

### D. INSPECTIONS AND SURVEYS

We have the right but are not obligated to:

1. Make inspections and surveys at any time;
2. Give you reports on the conditions we find; and
3. Recommend changes.

Any inspections, surveys, reports or recommendations relate only to insurability and the premiums to be charged. We do not make safety inspections. We do not undertake to perform the duty of any person or organization to provide for the health or safety of workers or the public.

And we do not warrant that conditions:

1. Are safe or healthful; or

2. Comply with laws, regulations, codes or standards. This condition applies not only to us, but also to any rating, advisory, rate service or similar organization which makes insurance inspections, surveys, reports or recommendations.

### E. PREMIUMS

The first Named Insured shown in the Declarations:

1. Is responsible for the payment of all premiums; and
2. Will be the payee for any return premiums we pay.
3. Premium shown in the Declarations was computed based on rates in effect at the time the policy was issued. On each renewal, continuation or anniversary of the effective date of this policy, we will compute the premium in accordance with our rates and rules then in effect.

### F. PREMIUMS, MINIMUM DEPOSIT AND AUDIT

All references in this policy to minimum and/or deposit premiums and premium audits is replaced by the following, as respects casualty:

Premium shown as advance premium is both a deposit premium and a minimum premium for the policy term. At the close of each audit period we will compute earned premium for that period. If earned is more than advance premium then the amount by which it exceeds advance premium is due and payable on notice to you. If earned is less, advance premium applies as the minimum premium with no return payable to you.

If this policy is cancelled the pro rata or short rate of the minimum and deposit premium will apply for the policy term, subject to an absolute minimum earned premium of 25% of the total advance premium, unless final audit develops greater than said 25%. If your business is a seasonal business, however, the minimum premium then becomes fully earned at the end of your season.

### G. TRANSFER OF YOUR RIGHTS AND DUTIES UNDER THIS POLICY

Your rights and duties under this policy may not be transferred without our written consent except in the case of death of an individual Named Insured.

If you die, your rights and duties will be transferred to your legal representative but only while acting within the scope of duties as your legal representative. Until your legal representative is appointed, anyone having proper temporary custody of your property will have your rights and duties but only with respect to that property.



## EVANSTON INSURANCE COMPANY

## COMMON POLICY DECLARATIONS

Previous Policy No.: CL470100500-01

Policy No.: CP470100909

POLICY PERIOD: From 05/10/2005 To 05/10/2006 Term: 1 YEAR  
at 12:01 A.M. Standard Time at your mailing address shown below.

Named Insured: LAKEWOOD SWIM CLUB

Mailing Address: 2088 LAKEWOOD DR  
ST ALBANS WV 25177

Street Number

City

State

Zip Code

This Company is not Licensed to  
do business in West Virginia & is  
not subject to the West Virginia  
Guaranty Act.

BUSINESS DESCRIPTION: PRIVATE SWIM CLUB

IN RETURN FOR THE PAYMENT OF THE PREMIUM, AND SUBJECT TO ALL THE TERMS OF THIS POLICY, WE AGREE  
WITH YOU TO PROVIDE THE INSURANCE AS STATED IN THIS POLICY.THIS POLICY CONSISTS OF THE FOLLOWING COVERAGE PARTS FOR WHICH A PREMIUM IS  
INDICATED. THIS PREMIUM MAY BE SUBJECT TO ADJUSTMENT.

## PREMIUM

Commercial Crime Coverage Part	\$	
Commercial General Liability Coverage Part	\$	3,623.00
Commercial Inland Marine Coverage Part	\$	
Commercial Ocean Marine Coverage Part	\$	
Commercial Professional Liability Coverage Part	\$	
Commercial Property Coverage Part	\$	1,395.00
	\$	
Premium Total	\$	5,018.00
Other Charges WV SL	\$	207.72
Other Charges WV SC	\$	50.18
Other Charges POLICY FEE	\$	175.00
Other Charges	\$	
Other Charges	\$	

Audit Period: Annual unless otherwise stated

TOTAL \$ 5,450.90

FORMS AND ENDORSEMENTS: MSU-100(05-00), 011-1095(07-01), 011-1096(01-02), 011-1061(08-02), 011-1051(05-98)

Inspection Ordered: ☐ Yes ☐ No ☐ Not Required Date:

U/W NAME:

Protection Class:

Photograph Ordered ☐ Yes ☐ No ☐ Not Required

Agency Name/Address: HUNTINGTON WV

Agency Number: CITY INS #4386

Countersigned: 05/24/2005 TP By

Date

AUTHORIZED REPRESENTATIVE

011-1058 (11/99)

INSURED

0003



## EVANSTON INSURANCE COMPANY

### TERRORISM EXCLUSION ENDORSEMENT

The following spaces preceded by an asterisk (\*) need not be completed if this endorsement and the policy have the same inception date.

ATTACHED TO AND FORMING  
PART OF POLICY NO.

CP470100909

\*EFFECTIVE DATE OF  
ENDORSEMENT

05/10/2005

\*ISSUED TO

LAKEWOOD SWIM CLUB

#### THIS ENDORSEMENT CHANGES THE POLICY.

This policy does not insure any loss, damage, claims, cost or expense, or any other sum either directly or indirectly arising out of, or relating to:

1. Any act of "Terrorism", or
2. Any action authorized by a governmental authority or agency for the purpose of preventing, terminating, countering or responding to any act of terrorism or for the purpose of preventing or minimizing the consequences of any act or threat of terrorism.

This exclusion applies regardless of whether there is: (a) any physical loss or damage to insured property; (b) any insured peril or cause whether or not contributing concurrently or in any sequence; (c) any loss of use, occupancy or functionality; or (d) any action required, including but not limited to, repair, replacement, removal, cleanup, abatement, disposal, relocation, or steps taken to address medical or legal concerns.

An act of "terrorism" means an activity that involves any violent act, including the threat of an activity or preparation for any activity, that:

1. Causes either:
  - (a) Damage to property; or
  - (b) Injury to person(s) and
2. Appears to be intended to:
  - (c) Intimidate or coerce a civilian population; or
  - (d) Disrupt any segment of an economy;
  - (e) Influence the policy of a governmental by intimidation or coercion; or
  - (f) Affect the conduct of a government by destruction, assassination, kidnapping or hostage-taking; or
  - (g) Advance a political, religious or ideological cause.

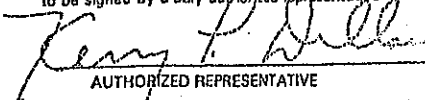
An act of "Terrorism" shall also include any incident determined to be such by an official, department or agency that has been specifically authorized by federal statute to make such a determination.

In the event any portion of this endorsement is found to be invalid or unenforceable, the remainder shall remain in full force and effect.

All other terms and conditions remain unchanged.

Nothing herein contained shall be held to vary, alter, waive or extend any of the terms, conditions, provisions, agreements or limitations of the above mentioned Policy, other than as above stated.

In Witness Whereof, the Company has caused this endorsement to be signed by a duly authorized representative of the Company.

  
AUTHORIZED REPRESENTATIVE



# EVANSTON INSURANCE COMPANY

## COMMERCIAL GENERAL LIABILITY COVERAGE PART SUPPLEMENTAL DECLARATIONS

These Supplemental Declarations form a part of policy number CP470100909

### LIMITS OF INSURANCE

General Aggregate Limit (other than Products/Completed Operations) \$ 1,000,000

Products/Completed Operations Aggregate Limit \$ EXCLUDED

Personal and Advertising Injury Limit \$ 1,000,000

Each Occurrence Limit \$ 1,000,000

Damage to Rented Premises \$ 50,000 Each Occurrence

Medical Expense Limit \$ 1,000 Any One Person

### BUSINESS DESCRIPTION AND LOCATION OF PREMISES COVERED BY THIS POLICY

Form of business:

☐ Individual ☐ Joint Venture ☐ Partnership ☒ Organization (other than Partnership or Joint Venture)

Location of all premises you own, rent or occupy: LAKEWOOD RD., ST ALBANS WV 25177

### PREMIUM

Description of Hazards/ Insured Classification(s)	Code No.	*Premium Basis	PR/Co	Rate		Advance Premium	
				All	Other	Pr/Co	All Other
SWIM CLUB	41666	150)MEMBERS	EXCL	24		\$ EXCL	\$ 3,600.00
SNACK BAR	16821	5,000)SALES	EXCL	4.5		EXCL	23.00

TOTAL  
ADVANCE  
PREMIUM \$ 3,623.00

\*(a) Area, (c) Total Cost, (m) Admission, (p) Payroll, (s) Gross Sales, (u) Units, (o) Other

### FORMS AND ENDORSEMENTS (other than applicable forms and endorsements shown elsewhere in the policy)

Forms and endorsements applying to this Coverage Part and made part of this policy at time of issue:

CG 00 01 (07-98), CG 00 57 (09-99), CG 21 68 (01-02), ME-011(04-99), ME-024(09-00), ME-048(04-99), ME-064(04-99),  
ME-155(04-99), ME-173(04-99), ME-189(09-00), ME-217(11-99), ME-221(04-99), ME-235(08-02), ME-247(04-99), MSU-001(06-04),  
PREEX(05-03)

THIS SUPPLEMENTAL DECLARATIONS AND THE COMMERCIAL LIABILITY DECLARATIONS, TOGETHER WITH THE COMMON POLICY  
CONDITIONS, COVERAGE FORM(S) AND ENDORSEMENTS COMPLETE THE ABOVE NUMBERED POLICY.

## COMMERCIAL GENERAL LIABILITY COVERAGE FORM

Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered.

Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy. The words "we", "us" and "our" refer to the company providing this insurance.

The word "insured" means any person or organization qualifying as such under Section II - Who Is An Insured.

Other words and phrases that appear in quotation marks have special meaning. Refer to Section V - Definitions.

### SECTION I - COVERAGES

#### COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY

##### 1. Insuring Agreement

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result. But:

- (1) The amount we will pay for damages is limited as described in Section III - Limits Of Insurance; and
- (2) Our right and duty to defend end when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments - Coverage A and B.

- b. This insurance applies to "bodily injury" and "property damage" only if:

- (1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory"; and
- (2) The "bodily injury" or "property damage" occurs during the policy period.

- c. Damages because of "bodily injury" include damages claimed by any person or organization for care, loss of services or death resulting at any time from the "bodily injury".

##### 2. Exclusions

This insurance does not apply to:

###### a. Expected Or Intended Injury

"Bodily injury" or "property damage" expected or intended from the standpoint of the insured. This exclusion does not apply to "bodily injury" resulting from the use of rea-

sonable force to protect persons or property.

###### b. Contractual Liability

"Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

- (1) That the insured would have in the absence of the contract or agreement; or
- (2) Assumed in a contract or agreement that is an "insured contract", provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement. Solely for the purposes of liability assumed in an "insured contract", reasonable attorney fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of "bodily injury" or "property damage", provided:
  - (a) Liability to such party for, or for the cost of, that party's defense has also been assumed in the same "insured contract"; and
  - (b) Such attorney fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged.

###### c. Liquor Liability

"Bodily injury" or "property damage" for which any insured may be held liable by reason of:

- (1) Causing or contributing to the intoxication of any person;
- (2) The furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or
- (3) Any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages.

This exclusion applies only if you are in the business of manufacturing, distributing, selling, serving or furnishing alcoholic beverages.

###### d. Workers' Compensation And Similar Laws

(1) The total amount that all such other insurance would pay for the loss in the absence of this insurance; and

(2) The total of all deductible and self-insured amounts under all that other insurance.

We will share the remaining loss, if any, with any other insurance that is not described in this Excess Insurance provision and was not bought specifically to apply in excess of the Limits of Insurance shown in the Declarations of this Coverage Part.

**c. Method Of Sharing**

If all of the other insurance permits contribution by equal shares, we will follow this method also. Under this approach each insurer contributes equal amounts until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first.

If any of the other insurance does not permit contribution by equal shares, we will contribute by limits. Under this method, each insurer's share is based on the ratio of its applicable limit of insurance to the total applicable limits of insurance of all insurers.

**5. Premium Audit**

a. We will compute all premiums for this Coverage Part in accordance with our rules and rates.

b. Premium shown in this Coverage Part as advance premium is a deposit premium only. At the close of each audit period we will compute the earned premium for that period. Audit premiums are due and payable on notice to the first Named Insured. If the sum of the advance and audit premiums paid for the policy period is greater than the earned premium, we will return the excess to the first Named Insured.

c. The first Named Insured must keep records of the information we need for premium computation, and send us copies at such times as we may request.

**6. Representations**

By accepting this policy, you agree:

a. The statements in the Declarations are accurate and complete;

b. Those statements are based upon representations you made to us; and

c. We have issued this policy in reliance upon your representations.

**7. Separation Of Insureds**

Except with respect to the Limits of Insurance, and any rights or duties specifically assigned in this Coverage Part to the first Named Insured, this insurance applies:

a. As if each Named Insured were the only Named Insured; and

b. Separately to each insured against whom claim is made or "suit" is brought.

**8. Transfer Of Rights Of Recovery Against Others To Us**

If the insured has rights to recover all or part of any payment we have made under this Coverage Part, those rights are transferred to us. The insured must do nothing after loss to impair them. At our request, the insured will bring "suit" or transfer those rights to us and help us enforce them.

**9. When We Do Not Renew**

If we decide not to renew this Coverage Part, we will mail or deliver to the first Named Insured shown in the Declarations written notice of the nonrenewal not less than 30 days before the expiration date.

If notice is mailed, proof of mailing will be sufficient proof of notice.

**SECTION V - DEFINITIONS**

1. "Advertisement" means a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters.

2. "Auto" means a land motor vehicle, trailer or semitrailer designed for travel on public roads, including any attached machinery or equipment. But "auto" does not include "mobile equipment".

3. "Bodily injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.

4. "Coverage territory" means:

a. The United States of America (including its territories and possessions), Puerto Rico and Canada;

b. International waters or airspace, provided the injury or damage does not occur in the course of travel or transportation to or from any place not included in a. above; or

c. All parts of the world if:

(1) The injury or damage arises out of:

(a) Goods or products made or sold by you in the territory described in a. above; or

(b) The activities of a person whose home is in the territory described in a. above, but is away for a short time on your business; and

(2) The insured's responsibility to pay damages is determined in a "suit" on the merits, in the territory described in a. above or in a settlement we agree to.

5. "Employee" includes a "leased worker". "Employee" does not include a "temporary worker".

6. "Executive officer" means a person holding any of the officer positions created by your charter, constitution, by-laws or any other similar governing document.



EVANSTON INSURANCE COMPANY

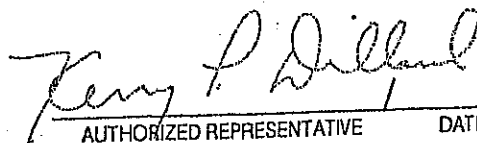
## ADDITIONAL INSURED - CLUB MEMBERS ENDORSEMENT

\* Entry optional if shown in the Common Policy Declarations. If no entry is shown, the effective date of the endorsement is the same as the effective date of the policy.

*ATTACHED TO AND FORMING PART OF POLICY NO. CP470100909	*EFFECTIVE DATE OF ENDORSEMENT 05/10/2005	*ISSUED TO LAKEWOOD SWIM CLUB
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THIS ENDORSEMENT CHANGES THE POLICY.

WHO IS AN INSURED (Section II) of the Commercial General Liability coverage part is amended to include as an insured any of your members, but only with respect to their liability for your activities or activities they perform on your behalf.

  
\_\_\_\_\_  
AUTHORIZED REPRESENTATIVE      DATE



# EVANSTON INSURANCE COMPANY

## SPECIFIED /DESIGNATED PREMISES/PROJECT LIMITATION

\*Entry optional if shown in the Common Policy Declarations. If no entry is shown, the effective date of the endorsement is the same as the effective date of the policy.

*ATTACHED TO AND FORMING PART OF POLICY NO.	*EFFECTIVE DATE OF ENDORSEMENT	*ISSUED TO
CP470100909	05/10/2005	LAKWOOD SWIM CLUB

THIS ENDORSEMENT CHANGES THE POLICY.

### Schedule

#### Premises:

LAKWOOD DR.  
ST ALBANS WV 25177

#### Project:

PRIVATE SWIM CLUB

(Complete above if information different than that shown in the Declarations)

This insurance applies only to "bodily injury", "property damage", "personal injury", "advertising injury" and medical expenses arising out of:

1. The ownership, maintenance or use of the premises shown in the Schedule (or Declarations);  
or
2. The project shown in the Schedule (or Declarations).

  
AUTHORIZED REPRESENTATIVE DATE

M/E-217 (11/99)

INSURED



IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

**MICHAEL BLANKENSHIP and  
MISTY BLANKENSHIP,**

**Plaintiffs**

**v.**

**Civil Action No. 06-C-2062  
Honorable James C. Stucky**

**THE CITY OF CHARLESTON and  
BOSTON CULINARY GROUP, INC.  
d/b/a DISTINCTIVE GOURMET,**

**Defendants,**

**and**

**THE CITY OF CHARLESTON and  
BOSTON CULINARY GROUP, INC.  
d/b/a DISTINCTIVE GOURMET,**

**Third-Party Plaintiffs,**

**v.**

**LAKEWOOD SWIM CLUB, INC.,**

**Third-Party Defendant/  
Fourth-Party Plaintiff,**

**v.**

**EVANSTON INSURANCE COMPANY,**

**Fourth-Party Defendant.**

**FOURTH-PARTY DEFENDANT EVANSTON INSURANCE COMPANY'S  
RESPONSES TO LAKEWOOD SWIM CLUB, INC.'S  
REQUEST FOR ADMISSIONS**

**NOW COMES** Evanston Insurance Company, by counsel, John F. McCuskey, Heather B. Lord, and Shuman, McCuskey & Slicer, PLLC, and responds to Fourth-Party Plaintiff Lakewood Swim Club, Inc.'s Request for Admissions as follows:

**REQUEST FOR ADMISSIONS**

**Request No. 1:** Admit that Lakewood Swim Club, Inc. purchased a general commercial liability insurance policy from Evanston Insurance Company bearing Policy No. CP470100909 with effective dates of May 10, 2005 to May 10, 2006.

**RESPONSE:** Admit.

**Request No. 2:** Admit that Evanston Insurance Company denied coverage for the claims asserted against Lakewood Swim Club in the instant civil action.

**RESPONSE:** Admit.

**Request No. 3:** Admit that Evanston Insurance Company denied coverage for the indemnity and contributions claims asserted by Boston Culinary Group before Evanston Insurance Company received a written coverage opinion from counsel.

**RESPONSE:** Admit. By way of further response, Evanston subsequently referred the matter to coverage counsel and a supplemental declination of coverage, dated July 30, 2007, was issued to Lakewood Swim Club.

**Request No. 4:** Admit that the subject policy was negotiated, purchased and issued in the State of West Virginia.

**RESPONSE:** Admit.

**Request No. 5:** Admit that Evanston Policy No. CP470100909 issued to Lakewood Swim Club contains Endorsement ME-217 (11/99).

**RESPONSE:** Admit.

**Request No. 6:** Admit that Evanston Policy No. CP470100909 does not define the term "project."

**RESPONSE:** Deny. The policy, specifically Endorsement ME-217(11/99), defines and/or identifies the "project" as "PRIVATE SWIM CLUB."

**Request No. 7:** Admit that Evanston Policy No. CP470100909 contains an Additional Insured-Club Members Endorsement M/E-011 (4/99).

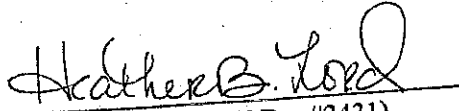
**RESPONSE:** Admit.

**Request No. 8:** Admit that Evanston Policy No. CP470100909 does not require that the "bodily injury" occur on the premises of the Lakewood Swim Club as a prerequisite to coverage.

**RESPONSE:** Admit. However, by way of further response, the policy, specifically Endorsement ME-217(11/99), requires that the "bodily injury" arise out of:

1. The ownership, maintenance or use of the premises shown in the Schedule (or Declarations) (i.e., Lakewood Drive, St. Albans, WV 25177); or
2. The project shown in the Schedule (or Declarations) (i.e., private swim club).

**EVANSTON INSURANCE COMPANY**  
**By Counsel**



John F. McCuskey (WV Bar #2431)

Heather B. Lord (WV Bar #9074)

**SHUMAN, MCCUSKEY & SLICER, PLLC**

Street: 1411 Virginia Street East, Suite 200 (25301)

Post Office Box 3953

Charleston, West Virginia 25339

(304) 345-1400

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA



MICHAEL BLANKENSHIP and  
MISTY BLANKENSHIP,

Plaintiffs,

Civil Action No. 06-C-2062

v.

THE CITY OF CHARLESTON,  
BOSTON CULINARY GROUP, INC.  
d/b/a DISTINCTIVE GOURMET, and  
LAKEWOOD SWIM CLUB, INC.,

Defendants,

and

THE CITY OF CHARLESTON and  
BOSTON CULINARY GROUP, INC.  
d/b/a DISTINCTIVE GOURMET,

Third Party Plaintiffs,

v.

LAKEWOOD SWIM CLUB, INC.,

Third Party Defendant/  
Fourth Party Plaintiff,

v.

EVANSTON INSURANCE COMPANY,

Fourth Party Defendant.

**PLAINTIFFS' RESPONSES TO DEFENDANT LAKEWOOD SWIM  
CLUB, INC.'S FIRST SET OF REQUESTS FOR ADMISSIONS**

Come now the plaintiffs, Michael Blankenship and Misty Blankenship, by counsel, Bruce L. Freeman of Freeman & Chirtas, and pursuant to the West Virginia Rules of Civil Procedure respond to defendant's Requests for Admissions as follows:

REQUEST 1. Admit that plaintiff has asserted a claim for negligence arising out of Lakewood Swim Club's operation of a concession stand on October 14, 2005.

RESPONSE. Admitted.

REQUEST 2. Admit that the concession stand at issue in this case was operated as a project of Lakewood Swim Club.


RESPONSE. Admitted.

REQUEST 3. Admit that plaintiff's claim for negligence against Lakewood Swim Club is premised upon the alleged negligence of its members who were operating a concession stand on October 14, 2005 on behalf of Lakewood Swim Club.

RESPONSE. Admitted.

MICHAEL BLANKENSHIP and  
MISTY BLANKENSHIP

By Counsel



Bruce L. Freeman (WV State Bar ID#1291)  
FREEMAN & CHIARTAS  
Post Office Box 347  
Charleston, West Virginia 25322  
304/342-4508



IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

MICHAEL BLANKENSHIP and  
MISTY BLANKENSHIP,

Plaintiffs,

v.

CIVIL ACTION NO. 06-C-2062  
Judge James C. Stucky

THE CITY OF CHARLESTON and  
BOSTON CULINARY GROUP, INC.  
d/b/a DISTINCTIVE GOURMET,

Defendants.

**BOSTON CULINARY GROUP, INC. d/b/a DISTINCTIVE GOURMET'S  
RESPONSES TO LAKEWOOD SWIM CLUB, INC.'S  
FIRST SET OF REQUEST FOR ADMISSIONS**

---

The defendant, Boston Culinary Group, Inc. d/b/a Distinctive Gourmet, for its Responses to Lakewood Swim Club, Inc.'s First Set of Request for Admissions, states as follows:

A. The information supplied in these Responses to Lakewood Swim Club, Inc.'s First Set of Request for Admissions is not based solely on the knowledge of said defendant, but may include the knowledge of its agents, representatives and attorneys.

B. The word usage and sentence structure may be that of its attorneys assisting in the preparation of these Responses to Lakewood Swim Club, Inc.'s First Set of Request for Admissions and thus does not necessarily purport to be the precise language of this defendant.

C. At this time, discovery is continuing and has not been completed. There may be additional facts which come to light during the discovery process requiring and permitting defendant to file supplemental Responses to Lakewood Swim Club, Inc.'s First Set of Request for Admissions.

REQUEST FOR ADMISSIONS

1. Admit that Boston Culinary Group, Inc. has asserted a claim for indemnity against Lakewood Swim Club but has not asserted a claim for damages arising out of breach of contract.

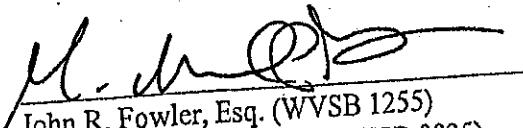
RESPONSE: Boston Culinary Group admits that it does not currently allege breach of contract. One of the counts set forth in Boston Culinary Group's Third-Party Complaint seeks to enforce its right to express indemnity.

2. Admit that Boston Culinary Group's claim for contribution is premised upon the alleged negligence of the members of Lakewood Swim Club who were operating a concession stand on October 14, 2005 on behalf of Lakewood Swim Club.

RESPONSE: Admit.

3. Admit that the concession stand at issue in this case was operated as a project of Lakewood Swim Club.

RESPONSE: Admit.

  
John R. Fowler, Esq. (WVSB 1255)  
Michael P. Markins, Esq. (WVSB 8825)  
*Counsel for Defendant Boston Culinary  
Group, Inc. d/b/a Distinctive Gourmet*

John R. Fowler, PLLC  
Suite 1190 United Center  
500 Virginia Street East  
Charleston, WV 25301  
Telephone: (304) 343-7211  
Facsimile: (304) 343-7233

EXHIBIT

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IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

**MICHAEL BLANKENSHIP and  
MISTY BLANKENSHIP,**

**Plaintiffs**

**v.**

**Civil Action No. 06-C-2062  
Honorable James C. Stucky**

**THE CITY OF CHARLESTON and  
BOSTON CULINARY GROUP, INC.  
d/b/a DISTINCTIVE GOURMET,**

**Defendants,**

**and**

**THE CITY OF CHARLESTON and  
BOSTON CULINARY GROUP, INC.  
d/b/a DISTINCTIVE GOURMET,**

**Third-Party Plaintiffs,**

**v.**

**LAKEWOOD SWIM CLUB, INC.,**

**Third-Party Defendant/  
Fourth-Party Plaintiff,**

**v.**

**EVANSTON INSURANCE COMPANY,**

**Fourth-Party Defendant.**

**ORDER GRANTING EVANSTON INSURANCE COMPANY'S  
MOTION FOR SUMMARY JUDGMENT**

On the 6<sup>th</sup> day of December, 2007, came the parties, by their respective counsel, pursuant to Lakewood Swim Club, Inc.'s *Motion for Partial Summary Judgment*, and Evanston Insurance Company's *Motion for Summary Judgment*. Having fully considered the parties' respective motions, as well as the oral argument of counsel, and for the reasons set forth herein, this Court hereby ORDERS that Evanston Insurance Company's *Motion for Summary Judgment* is GRANTED.

**FINDINGS OF FACT**

1. This action arises out of a slip and fall that plaintiff Michael Blankenship sustained on October 14, 2005, during a Rascal Flatts concert at the Charleston Civic Center, when he allegedly slipped on beer spilled at or near a concession stand.

2. Plaintiff filed suit against the City of Charleston and Boston Culinary Group, d/b/a Distinctive Gourmet, alleging that they negligently operated beer concession stands during the concert.

3. Boston Culinary Group, in turn, joined Lakewood Swim Club as a defendant, on the basis that Lakewood Swim Club was allegedly operating the subject concession stand at the time of the accident.

4. At the time of plaintiff's accident, Lakewood was insured by Evanston Insurance Company pursuant to policy number CL470100500-01.

5. The Evanston commercial general liability policy contains Endorsement

M/E-217 (11/99), which provides as follows:

**SPECIFIED/DESIGNATED PREMISES/PROJECT LIMITATION**

**THIS ENDORSEMENT CHANGES THE POLICY.**

**Schedule**

**Premises:**

LAKEWOOD DR.  
ST ALBANS WV 25177

**Project:**

PRIVATE SWIM CLUB

(Complete above if information different than that shown in the Declarations)

This insurance applies only to "bodily injury", "property damage", "personal injury", "advertising injury" and medical expenses arising out of:

1. The ownership, maintenance or use of the premises shown in the Schedule (or Declarations); or
  2. The **project** shown in the Schedule (or Declarations). (emphasis added.)
6. The policy provides coverage for "bodily injury" claims against Lakewood Swim Club only if the "bodily injury" arises out of the ownership, maintenance or use of the designated premises (LAKEWOOD DR., ST. ALBANS, WV 25177) or if the "bodily injury" arises out of the designated project (PRIVATE SWIM CLUB).
7. It is undisputed that plaintiff's bodily injury claim did not arise out of the ownership, maintenance or use of the premises (LAKEWOOD DR., ST. ALBANS, WV 25177) designated in the policy of insurance.

8. Evanston Insurance Company denied Lakewood Swim Club's claim for insurance coverage in this matter based, in part, on the fact that plaintiff's alleged bodily injuries did not arise out of the designated project (PRIVATE SWIM CLUB).

9. Tim Quinlan, acting on behalf of Lakewood Swim Club, completed and signed an application for the Evanston Insurance Company policy in 2005, which application was appended to Evanston Insurance Company's motion. The contents of that application have not been disputed by Lakewood Swim Club. Pursuant to the application, Lakewood Swim Club made the following representations as to the scope and nature of the project to be insured:

- a. The application specifically inquired whether any outside events were sponsored by the swim club, to which Mr. Quinlan responded, "no";
- b. The application further inquired whether the swim club engaged in any special events on or off the swim club premises, to which Mr. Quinlan again responded, "no";
- c. The application completed and signed by Tim Quinlan, on behalf of Lakewood Swim Club, inquired whether there was a snack bar **on the swim club premises**, to which Mr. Quinlan responded, "yes."
- d. Pursuant to the application, Mr. Quinlan, on behalf of Lakewood Swim Club, advised Evanston Insurance Company that no alcohol was permitted around the pool.

10. The representations made by Lakewood Swim Club in the policy application were utilized by Evanston Insurance Company to evaluate the risk to be insured.

11. Neither Tim Quinlan nor any other person associated with Lakewood

Swim Club advised Evanston Insurance Company that Lakewood Swim Club would operate any off-premises concession at any time. Specifically, the insured never provided any evidence to Evanston Insurance Company that the "project" would include the operation of a beer concession stand at the Charleston Civic Center during a country music concert. To the contrary, Lakewood Swim Club represented to Evanston Insurance Company that ***no outside events were sponsored by the swim club*** and that ***the swim club did not engage in any special events on or off the swim club premises.***

12. Lakewood Swim Club has presented no evidence to show that the swim club misunderstood the application and/or the terms and conditions set forth in the policy of insurance.

#### **CONCLUSIONS OF LAW**

1. Determination of the proper coverage of an insurance contract, when the facts are not in dispute, is a question of law. Syl. Pt. 1, *Tennant v. Smallwood*, 211 W.Va. 703, 568 S.E.2d 10 (2002).

2. Language in an insurance policy should be given its plain, ordinary meaning. Syl. Pt. 1, *Soliva v. Shand, Morahan & Co.*, 176 W.Va. 430, 345 S.E.2d 33 (1986). Where the provisions in an insurance policy contract are clear and unambiguous they are not subject to judicial construction or interpretation, but full effect will be given to the plain meaning intended. *Keffer v. Prudential Ins. Co.*, 153 W.Va. 813, 172 S.E.2d 714 (1970).

3. "A liability insurer need not defend a case against the insured if the alleged conduct is entirely foreign to the risk insured against." *Horace Mann Ins. Co. v. Leeber*, 180 W.Va. 375, 378, 376 S.E.2d 581, 584 (1988).

4. The Evanston Insurance Company policy definition of the designated "project" as PRIVATE SWIM CLUB is not ambiguous.

5. The unambiguous definition of the designated project as PRIVATE SWIM CLUB does not include a beer concession stand at the Charleston Civic Center during a country music concert.

6. Plaintiff's alleged bodily injury did not arise out of the designated project (PRIVATE SWIM CLUB), as required by the clear, plain and unambiguous language of the policy issued to Lakewood Swim Club by Evanston Insurance Company.

7. Lakewood Swim Club did not have a reasonable expectation that its members' operation of a beer concession stand at the Charleston Civic Center during a country music concert was an insured risk, as evidenced by the policy application.

8. It is an unreasonable and untenable assertion that the known insuring of an on-premises snack bar by Evanston Insurance Company would expand the insured risk to include the selling of beer by members of the insured at an off-premises concession stand.

9. The policy application completed and signed by Tim Quinlan on

behalf of Lakewood Swim Club is consistent with the unambiguous terms and conditions of the Evanston Insurance Company policy. The policy application completed and signed on behalf of Lakewood Swim Club shows that Lakewood Swim Club understood and agreed that no outside events would be sponsored by the swim club and that there would be no special events on or off the premises.

10. The one-time operation of a of a beer concession stand at the Charleston Civic Center during a country music concert was a special event because it was not within the regular course of business of the designated project, a private swim club.

11. Evanston Insurance Company was provided no information during the application process that Lakewood Swim Club would undertake the operation of a beer concession stand at the Charleston Civic Center during a country music concert, thereby rendering it a special event, unknown to the insurer and foreign to the risk insured.

12. Plaintiff's alleged bodily injury did not arise out of the designated project (PRIVATE SWIM CLUB), as required by the clear, plain and unambiguous language of the policy issued to Lakewood Swim Club by Evanston Insurance Company and, therefore, the Evanston Insurance Company policy does not provide coverage for the claims asserted against the swim club in this action.

13. The Court hereby finds that Evanston Insurance Company has no duty to indemnify Lakewood Swim Club for the claims arising out of plaintiff's alleged

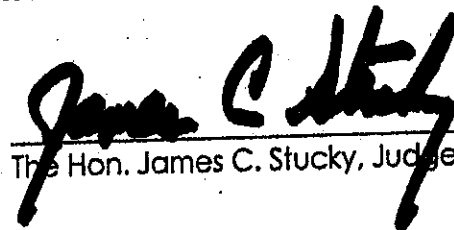
bodily injury, based on the clear, plain and unambiguous language of the Evanston Insurance Company policy.

14. The Court further finds that Evanston Insurance Company has no duty to defend Lakewood Swim Club for the claims arising out of plaintiff's alleged bodily injury, based on the clear, plain and unambiguous language of the Evanston Insurance Company policy.

WHEREFORE, it is hereby ORDERED that Evanston Insurance Company's Motion for Summary Judgment is GRANTED and Lakewood Swim Club, Inc.'s Motion for Partial Summary Judgment is DENIED. The Fourth-Party Complaint against Evanston Insurance Company is hereby dismissed in its entirety. The objections of the parties are noted and preserved.

The Clerk is directed to forward a copy of this Order to counsel of record.

Entered this 11th day of December, 2007.

  
The Hon. James C. Stucky, Judge

STATE OF WEST VIRGINIA  
COUNTY OF KANAWHA, SS  
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY  
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING  
IS A TRUE COPY FROM THE RECORDS OF SAID COURT  
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS  
11th day of December, 2007.  
CATHY S. GATSON, CLERK  
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

RECEIVED

MAY 10 2005

EXHIBIT

H



## MARKEL SOUTHWEST UNDERWRITERS, INC.

SWIM & RACQUET CLUB SUPPLEMENT  
(Include Acord application)

Applicant's Name: LAKEWOOD SWIM CLUB INC Location Address: 2088 LAKEWOOD BLVD  
 Mailing Address: PO BOX 132 ST. ALBANS WV 25177  
ST ALBANS WV 25177

Risk is ☒ Swim Club ☐ Tennis Club ☐ Racquetball Club Number of members 175

Is there a pool? ☒ Yes ☐ No Rules posted? ☒ Yes ☐ No Lifeguards? ☒ Yes ☐ No  
 Are lifeguards trained/certified in CPR? ☒ Yes ☐ No  
 Any diving boards/platforms? ☒ Yes ☐ No If yes, height 2 FT.  
 Any slides? ☐ Yes ☒ No If yes, height ---  
 Are there depth markers? ☒ Yes ☐ No  
 Who is responsible for pool maintenance? POOL MANAGER  
 Location of emergency shut off valve. MAIN BUILDING  
 Is there a life ring or any other lifesaving equipment at the pool? ☒ Yes ☐ No  
 If yes, please describe: BACK BOARD LIFE RING, PULL - TO PULL SOMEONE OUT  
 Any diving competition or diving teams? ☐ Yes ☒ No  
 If yes, please describe ---  
 Dive instructors? ☐ Yes ☒ No  
 If yes, please describe: ---  
 Does applicant have Workers Compensation coverage in force? ☒ Yes ☐ No  
 Does applicant lease employees? ☐ Yes ☒ No Total number of employees: 20  
 How many tanning beds? 0 Goggles provided? ☐ Yes ☐ No Self timers? ☐ Yes ☐ No  
 Are beds UL approved? ☐ Yes ☐ No  
 Hours of operation From 10 AM to 7 PM M-S  
 If 24 hour service, please advise staffing. N/A  
 Is parking lot well lit? ☒ Yes ☐ No  
 Number of tennis courts 0  
 Any public receipts from hourly rental? ☐ Yes ☒ No  
 Any show facilities? ☐ Yes ☒ No Do showers have non-skid floors? ☒ Yes ☐ No Sauna or steam? ☐ Yes ☒ No Jacuzzi? ☐ Yes ☒ No  
 Describe cleaning schedule DAILY  
 Are gymnastics taught? ☐ Yes ☒ No Any trampolines? ☐ Yes ☒ No  
 Describe procedure in case of accident. FOLLOW EMERGENCY GUIDELINES  
 Are minors permitted to join club? ☐ Yes ☒ No  
 Maximum number of children: --- Maximum age ---  
 Is pro shop on premises? ☐ Yes ☒ No If yes, sales \$ ---  
 Any alcohol or glass containers allowed around pool? ☐ Yes ☒ No  
 Any outside events sponsored? ☐ Yes ☒ No Special events on or off premises? ☐ Yes ☒ No  
 If yes, please describe ---  
 Are non-members allowed on the premises? ☒ Yes ☐ No Any non-member receipts? ☒ Yes ☐ No  
 If yes, please explain GUEST FEE - FOR MEMBERS CAN PAY TO BE GUEST  
 Any professional trainers? ☐ Yes ☒ No Number ---  
 Any masseuse? ☐ Yes ☒ No If yes: ☐ Employees ☐ Independent contractors  
 If independent contractors, are certificates of insurance provided? ☐ Yes ☒ No Number ---

Any person who knowingly and with intent to defraud any insurance company or other person files an application for insurance containing false information, or conceals for the purpose of misleading, information concerning any fact material thereto, commits a fraudulent insurance act, which is a crime This application does not bind any of the parties to complete the insurance transaction

Jim Oulim  
Applicant's Signature

Theresa DeBarden  
Producer's Signature

5/10/05  
Date

No. 34399

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**MICHAEL BLANKENSHIP and  
MISTY BLANKENSHIP,**

**Plaintiffs Below, Appellees,**

**v.**

**THE CITY OF CHARLESTON and  
BOSTON CULINARY GROUP, INC.  
d/b/a DISTICTIVE GOURMET,**

**Defendants/Third-Party Plaintiff Below, Appellees,**

**v.**

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**LAKEWOOD SWIM CLUB, INC.**

**Third-Party Defendant/  
Fourth-Party Plaintiff Below, Appellant,**

**v.**

**EVANSTON INSURANCE COMPANY,**

**Fourth-Party Defendant Below, Appellee.**


**CERTIFICATE OF SERVICE**

I, C. Benjamin Salango, hereby certify that a true and correct copy of the foregoing **Brief of Appellant Lakewood Swim Club** has been served on November 12, 2008, by mail addressed to the following:

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Charleston, WV 25339

  
\_\_\_\_\_  
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